STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
Illinois Bell Telephone Company	:	
	:	Docket No. 08-0569
Investigation of specified tariffs declaring	:	
certain services to be competitive	:	
telecommunications services	:	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

PUBLIC VERSION

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The Staff of the Illinois Commerce Commission (the “Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned matter.

As a preliminary matter, the Staff notes that it will only respond to certain arguments in the parties’ respective Initial Briefs that, in its view, warrant specific response. In doing so, Staff does not waive any positions taken in its Initial Brief or other pleadings in this matter, and fully realleges and reincorporates them.

I. The Commission Should Ignore the AG’s Price Comparisons

The Attorney General (hereafter “AG”) presents several price comparisons purporting to demonstrate that “reclassification will result in significant increases in the amounts residential consumers pay Illinois Bell.” AG IB at 5. The comparisons the AG selects are misleading and not well taken, and do not in any case support the conclusion that the AG reaches.

As a preliminary matter, the price comparison analysis that the AG performs for the first time in its Initial Brief was not presented by the AG’s witness in this case, and therefore is unsupported by expert testimony. Thus, the Administrative Law Judge and the Commission should take note of the untimeliness and faultiness of the AG’s analysis and, for this reason alone, accord it little relevance in making a final determination.

Putting aside the tardiness of its presentation, the analysis that the AG performs is misleading, and has numerous flaws.

(A) The AG's "typical customer" based comparison analysis is misleading

The AG compares the price of what it characterizes as "typical" "basic service" to prices of four AT&T packages: the Complete Choice Enhanced Package; the Select Feature Package; the Consumers Choice Extra Package; and the Consumers Choice Plus package and concludes that "more than 200,000 basic rate customers will be unable to avoid price increases over the next several years." AG IB at 6.

The AG's allegedly typical basic service customer spends $1.53 per month on usage. AG IB at 5. The AG does not explain what is meant by "basic service" or why it is appropriate to use the local usage level of $1.53 in its comparison. Id. The Staff assumes that, by "basic service", the AG refers to measured services (or standalone services). The Staff further assumes that the $1.53 local usage (or 75 local calls)[1] is the amount of local usage included in AT&T's "typical monthly bill" — i.e., the amount a typical (or average) measured service customer would spend on local usage. AG Cross Exhibit No. 11.

It is true that in certain circumstances, an analysis based on a typical customer has some utility. Nonetheless, it is at least misleading to do so here. The Commission should not confine its analysis of measured services reclassification to a so-called "typical" – which is to say statistically average – customer when assessing the impact of reclassification on measured service

[1] The current local usage rate is 0.02030 per call in the Greater Illinois LATAs. So, a local usage of $1.53 is equivalent to about 75 local calls.

customers or the existence of substitutes for measured services. Measured service customers have wildly varying usage patterns and vertical service needs. The AG, however, assumes a non-existent universe of identical, average measured service customers. This causes the AG's results to be of little utility.

As noted above, the average measured service customer in the Greater Illinois LATAs spends $1.53 a month on local usage, which is equivalent to about 75 local calls. AG IB at 5. However, measured service usage varies widely across customers in all of the Greater Illinois LATAs. AT&T IL EX 6.0, Sch. 6.3. Measured service customers falling in the "typical customer" category — i.e., customers making around 75 local calls — constitute only a tiny portion of all measured service customers. For instance, measured service customers making 73-77 local calls are only 2.48% of total measured service customers.[2] Therefore, conclusions drawn based on the analysis of a typical statistically average measured service customer are only applicable to or appropriate for a tiny portion of total measured service customers, but are inapplicable and inappropriate for measured service customers in general.

For example, a measured service customer who makes about 75 local calls a month would pay $10.53 for local service ($9.00 for network access line and $1.53 for local usage). AG IB at 5. This customer would pay $12.20[3] per

[2] The calculation of 2.48% assumes that customers making between 61-75 calls and between 76 and 90 calls are uniformly distributed, respectively. In more specific term, it assumes the same number of measured service customers make 61, 62, ..., 75 calls, respectively. Similarly, it assumes the same number of measured service customers make 76, 77, …, 90 calls, respectively.

[3] Note the Monthly Recurring Charge (MRC) for Consumer Choice Basic — which includes a 30 local call allowance — is $9.50. Price for calls over 30 is $0.06 per call. The total price for the customer making 75 local calls under Consumes Choice Basic would be $12.20 = $9.50 + 45 calls at $0.06 each.

month under Consumer Choice Basic and $16.00 per month under Consumer Choice Extra, respectively. However, this does not in any way lead to the conclusion that Consumer Choice Basic and Consumer Choice Extra are higher cost options than measured services for all measured service customers, as implied by the AG. AG IB at 5-6. Likewise, it does not follow that Consumer Choice Basic or Consumer Choice Extra is not a substitute for measured service for customers at any usage level. On the contrary, for a customer who makes 30 local calls and subscribes to no calling features, Consumer Choice Basic is not only a good substitute for measured service, but is also lower in cost than measured service. Similarly, for a customer who makes at least 500 local calls, Consumer Choice Extra is a lower cost substitute for measured service. In short, conclusions drawn based on comparison of allegedly "typical" measured service (i.e., measured service with 75 local calls) to Safe Harbor and other packages may not be applicable to all measured service customers.

Furthermore, a measured service customer does not pay the full price ($0.0203 per call) for local usage beyond the first 128 calls.[4] The "typical" measured service customer makes 75 calls per month and would not be eligible for AT&T's local usage discount, thus paying the full price for local usage. Therefore, the typical customer based analysis would also run the risk of overstating the total price that the measured service customers have to pay for

[4] Local usage discounts, ranging from 34.5% to 100%, are applied to local usage beyond the first $2.60. The first $2.60 local usage is equivalent to 128 calls at $0.0203 each. No discount is applied to the first $2.60 local usage or 128 local calls in the Greater Illinois LATAs. ILL. C.C. No. 19, Part 4, Section 2, 7th Revised Sheet 12.

local usage by failing to take into account local usage discounts that measured service customers enjoy.

(B) The AG presents multiple inconsistent numbers of customers taking basic rate (or measured) services

The AG asserts that "more than 200,000 basic rate customers will be unable to avoid price increases over the next several years". AG IB at 6. The AG does not explain how it derives the figure of 200,000. As the AG noted, approximately 42% of customers in the Greater Illinois LATAs take basic (measured) service. AG IB at 5. AT&T serves a total of ***BEGIN CONFIDENTIAL XXXXX END CONFIDENTIAL*** residential access lines in the Greater Illinois LATAs. AT&T Ex 1.0 Sch. WKW-5. Accordingly, this means that there are roughly ***BEGIN CONFIDENTIAL XXXXXX END CONFIDENTIAL*** measured (or basic) service customers in the Greater Illinois MSAs. This figure is consistent with AT&T's numbers, which show the total number of measured service customers in the Greater Illinois LATAs to be ***BEGIN CONFIDENTIAL XXXXXX. END CONFIDENTIAL*** AT&T IL Ex 6.0 Sch. 6.3. Thus, at best, the AG presents multiple inconsistent numbers of customers taking basic rate (or measured) services. At worst, the AG overstates the total number of measured service customers.

(C) The AG does not consider all options when enumerating and describing the alternatives from which AT&T's basic service (measured) customers may select.

When enumerating and describing the alternatives from which AT&T's basic service (measured) customers may select, the AG's analysis ignores the Consumer Choice Basic Safe Harbor plan — which includes a network access line and 30 local calls — from its comparison. AG IB at 6. This plan is a low priced alternative option available from AT&T for low usage customers that do not purchase features and that are considering similarly configured alternatives. Omission of this low cost option not only means that the AG's analysis is incomplete and, thus erroneous, but provides a grossly misleading portrayal of the options available to customers.

(D) The AG's comparison of AT&T's Select Feature package with unlimited long distance with Consumer Choice Plus with unlimited long distance does not support its assertion that Greater Illinois consumer "will pay Illinois Bell more, rather than less, due to 'competition'"

The AG's analysis presents a comparison between a customer that purchases the Select Feature Package with unlimited long distance and one that purchases Consumer Choice Plus and unlimited long distance. AG IB at 7. The AG purports to show that the total price of Consumer Choice Plus — which includes two calling features — in combination with unlimited long distance, of $44.85, is "almost identical to" the price of AT&T's Select Feature package — which includes nine calling features — with unlimited toll, of $45.00, or $40.00, if ordered online. AG IB at 7. The AG then asserts that "Greater Illinois consumers

will find that they will pay Illinois Bell more, rather than less, due to 'competition". AG IB at 7.

This assertion lacks merit. On a fundamental level, neither reclassification nor competition forces any customers to move from the Select Feature package with or without unlimited long distance to the Consumer Choice Plus with or without unlimited long distance. Existing Select Feature customers may continue to take the package at the existing price.

The AG's comparison of the Select Feature package to the Consumer Choice Plus does not lend any support for its conclusion that "competition" forces customers in the Greater Illinois LATAs to pay more.

Moreover, the AG's comparison ignores the existence of AT&T's Complete Choice Enhanced package, which is comparable in composition to the Select Feature Package but lower-priced than Select Feature package. The Complete Choice Enhanced package provides an access line, unlimited local calling, and twelve calling features for $26.00, as opposed to $28.00 for the more limited services obtained through the Select Feature Package. Staff Ex. 1.0 at 34-35.

Furthermore, since the AG provides no evidence to show how many Select Feature customers elect not to take the completely optional long distance service offering obtainable with the package, its inclusion of long distance renders all of its rate comparisons particularly pointless. This is particularly true in light of the fact that the evidence in this case shows that landline switched access minutes of use (i.e., toll minutes of use) in AT&T's Illinois territory have

declined precipitously since 2000. AT&T Ex. 1.0 at 62-63. Further evidence tends to show that this is because customers are increasingly using wireless phones to make toll calls. Id. at 64-65. Accordingly, landline toll and long distance usage appears to be of markedly less value to customers than it once was. Without unlimited long distance, the price of Consumer Choice Plus, of $19.85, is no longer "almost identical to" the price of Select Feature package, of $28.00. Nonetheless, the price Comparison of Consumer Choice Plus and Select Feature package does not lend any support for the AG's contention that Greater Illinois consumers "will pay Illinois Bell more, rather than less, due to 'competition'". AG IB at 7.

In sum, the AG's conclusion that "more than 200,000 basis rate customers will be unable to avoid price increases over the next several years" is flawed and inaccurate. Moreover, by submitting this analysis at the eleventh hour, the AG has left itself no opportunity to correct these flaws, and the Commission and parties little opportunity to scrutinize the AG's calculations and assumptions, which, as seen above, are sufficiently erroneous on their face to warrant the most careful review. The Commission, therefore, must simply disregard this AG conclusion.

II. Prepaid wireless service should not be entirely dismissed as an alternative to measured service

The AG asserts that prepaid wireless service is not "available at rates, terms and conditions that are comparable to landline basic service". AG IB at 13. Thus, the AG dismisses prepaid wireless services as substitutes or alternatives to AT&T's measured services.

As a preliminary matter, substitutes or functionally equivalent alternatives for measured services do not themselves have to be measured services. While no carrier other than AT&T offers local service on a standalone basis, this does not mean that there are no alternatives or substitutes for AT&T's measured services.

Unlike most package services with single prices, the price that a measured service customer pays varies widely, depending on the number of local calls and the number of features purchased on *a la carte* basis. By way of example, a measured service customer subscribing to no calling features will pay from $9.20 to $18.80 per month as local usage varies from 10 to 800 calls. Similarly, the price that a measured service customer subscribing to standalone Call Waiting, Caller ID, and Caller ID with Name will pay ranges from $15.58 to $25.18 as local usage varies from 10 to 800 calls. Thus, there is probably no prepaid (wireless) service that is a comparably or lower priced alternative to measured service for the entire universe of measured service customers. This, however, does not preclude a package service from being a comparably or lower priced alternative for measured service for a subset of measured service customers.[5]

Staff urges the Commission to reject AT&T's claim that prepaid (or pay-as-you-go) wireless services are substitutes or alternatives for measured services for every measured service customer. Staff Ex 1.0 at 46-47. This is because measured service customers are not identical in terms of usage pattern — i.e.,

[5] The comparisons here generally focus on price and do not consider that consumers might view higher priced, but more expansive services, as substitutes for lower priced, but less expansive services.

number of local call and average call duration — and number of calling features purchased, and thus the prices such customers pay will not be identical, which renders it unlikely that any prepaid wireless service is a comparably or lower priced alternative to measured services for every customer. On the other hand, the AG's total dismissal of prepaid wireless services as comparably priced alternatives to measured services is unwarranted. The appropriate conclusion would be that none of the prepaid wireless service is comparably or lower priced alternative to measured service for every customer, but some prepaid wireless services are comparably or lower priced alternatives for some subset of measured service customers.

By way of example, a customer making eight local calls with five minutes duration each would pay $9.81 under AT&T's measured service. However, under the Tracfone 60 Minutes Calling Plan, the same calls would cost $13.33. Staff Ex 1.0 at 46; AG IB at 14. For this particular customer, measured service would be a lower cost option than the Tracfone 60 Minutes Calling Plan. However, for a customer that makes a total of twenty-seven or fewer minutes of local calls per month, the Tracfone 60 Minutes would represent a lower cost alternative to AT&T's measured service.

More generally, for a given average call duration, a prepaid wireless service is more likely to be a lower-priced alternative to measured service for a customer making few local calls. This is because a prepaid wireless service customer is generally charged for usage but not for a "network access line", as measured service customers are. Similarly, for a customer making a large

number of local calls, AT&T's measured service is more likely to be a lower cost option than a prepaid wireless plan. This is because the per call usage price under AT&Ts' measured service is generally much lower than the *per call* usage price under a prepaid wireless service plan.[6] Put differently, whether a given prepaid wireless service is a comparably or lower priced alternative to measured service for a particular customer depends on the characteristics of the customer — i.e., the number of local calls the customer makes and the average duration of these calls.

In summary, while it is unlike that a prepaid wireless plan would be a comparably, or lower, priced alternative to measured service for the entire universe of measured service customers, it is likely to be a comparably or lower priced alternative to measured service for a subset of measured services. Similarly, different prepaid wireless service plans are likely to be comparably priced alternatives for different subsets of measured service customers. Therefore, the Commission should reject the AG's total dismissal of prepaid wireless services as comparably or lower priced alternatives to measured service customers.

III. Price increases following reclassification are not sufficient evidence of lack of competition

The AG has repeatedly cited the price increases in MSA 1 as support for the proposition that reclassification in MSA 1 should not have been granted, and, by extension, that reclassification in the Greater Illinois LATAs should not be

[6] Prepaid wireless services customers generally pay for usage on a per *minute-of-use* (MOU) basis. So, the "per call usage price" under a prepaid wireless service plan is calculated as the per MOU price multiplied by the average call duration.

granted. AG Ex 1.0 at 13; AG IB at 21, *et seq*. The AG points to the post-reclassification price increases as sufficient evidence of lack of competition in the "basic service" market. The AG's arguments should be discounted.

AT&T had been subject to the Commission's price-cap regulation since 1994,[7] while its competitors were subject to a far less restrictive — "just and reasonable" — price standard prior to the reclassification. Staff Ex. 3.0 at 6. This asymmetric price regulation, which capped AT&T's residential rates, did not prevent AT&T's competitors from entering the residential service market, or from gaining market share or residential customers from AT&T, and indeed the evidence is this proceeding overwhelmingly supports a finding that they have done precisely that. AT&T Illinois Ex. 1.0, Schedule WKW-5 (Revised). Accordingly, it follows that removal of price-cap regulation will only *further* encourage market entry and competition, as other carriers no longer have to compete against AT&T's artificially low — i.e., non-market based — residential service prices.

Contrary to the AG's contention, *see* AG Ex. 1.0 at 13, price decreases do not necessarily follow the removal of price-cap regulation, i.e., reclassification. . As Staff has noted, reclassification moves services out from under a system of strict price limitations, limitations that have even in certain instances kept rates below costs. Staff Ex. 1.0 at 47-48. Thus, increases in prices for some customers do not, as the AG suggests, signal the absence of competition.

[7] *See, generally*, *Final Commission Order*, Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services Under an Alternative Form of Regulation, ICC Docket Nos. 92-0448/93-0239 (Consol.), (October 11, 1994) (hereafter "Alt. Reg. Order") (Commission imposes alternative regulation plan)

Determining the relevance of price increases and their relationship to the presence or absence of competition requires a careful and complete evaluation of the circumstances surrounding such increases. The AG has not provided such an evaluation.

Moreover, as the General Assembly recognizes, competition will not necessarily result in reduced prices for all consumers:

> "[T]he competitive offering of all telecommunications services will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new businesses to Illinois." 220 ILCS 5/13-102(f) (emphasis added).

As this passage indicates, the General Assembly has not concluded that competition will necessarily result in reduced prices for all consumers. Instead, it recognizes that benefits of competition may take forms other than reduced consumer prices.

Therefore, the Commission should dismiss the AG's contention that the post reclassification price increases in MSA-1 are sufficient ground for rejecting AT&T's reclassification request in this proceeding.

IV. The AG's assertion that the Consumers Choice "safe harbor" packages have not protected consumers from higher prices is not well founded

The AG alleges that Consumers Choice packages have not protected consumers from higher prices. AG IB at 34. To support its contention, the AG notes that an allegedly modest number of customers subscribe to Consumers Choice packages, compared to the numbers of customers purchasing standalone

network access lines, standalone Caller ID and Call Waiting. The "disappointingly low" subscribership, the AG alleges, thus calls into questions "the assumption that those rates would provide consumers a 'safe harbor' from rate increases occasioned by the 'competitive' classification." AG IB at 37. The AG further attributes the "disappointingly low" subscribership of Consumers Choice packages to inadequate "customer notification and online descriptions of these packages". AG IB at 37. In other words, the AG suggests that the "disappointingly low" subscribership is due to customers not being informed of the availability of Consumers Choice packages.

The AG errs in several respects in reaching its conclusions. It is correct that the total number of customers in MSA-1 subscribing to Consumers Choice packages remained less than 20% of customers continuing measured services as of June 30, 2008. AT&T IL Semi-Annual MSA-1 Subscribership Report. However, subscribership to Consumers Choice packages has grown by double or triple digits during every six month period since the inception of the packages at the end of 2006. For example, during the first six months in 2008, subscribership of Consumers Choice packages grew by 25% and subscribership of Consumers Choice Plus grew by 57%. Subscribership for standalone Caller ID and Call Waiting declined by 14% and 27%, respectively. AT&T IL Semi-Annual MSA-1 Subscribership Reports.

In contrast, subscribership for standalone Call Waiting has *declined* by double digits in each of the same six-month periods. Similarly, the number of

customers subscribing to standalone Caller ID has been declining as well during the same periods

Since the end of 2006, AT&T has increased the price of network access lines, local usage, Caller ID and Call Waiting in MSA-1, in some cases several times. These rate increases make Consumers Choice packages more appealing to more customers. The trend in subscribership of Consumers Choice packages has a strong positive correlation with the rate increases for basic services and standalone calling features. This refutes the notion that customer notification is inadequate.

The growth in subscribership in Consumers Choice packages also contradicts the AG's assertion that these packages "have not protected consumers from higher prices". AG IB at 34. Insofar as customers switch to Consumers Choice packages in response to rate increases for basic services and/or calling features, Consumers Choice packages are indeed providing the "safe harbor" the Commission intended them to provide.

It is undoubtedly the case that some customers continue to subscribe to measured services, even though Consumers Choice packages represent lower cost options for these customers. These customers' "failure" to switch to lower cost options may not be due to inadequate customer notifications or irrational behavior, as suggested by AG. AG IB at 37.

When a <u>new</u> customer is faced with various service options, purely rational economic decision making dictates that the customer will elect the lowest priced option that meets his needs. However, an <u>existing</u> measured service

customer's decision making process is slightly different because the existing customer currently has services. If the existing customer is content with his services and finds them suitable, he may choose not to explore all or indeed any available options, despite being fully advised of them. Even if an existing customer is willing to explore available options, this does not mean that the customer will respond to every rate increase for basic services or calling features, regardless of the magnitude of the benefits that might accrue to the customer by doing so. The existing measured service customer may weigh the benefits — enjoying lower-priced phone services — against the time and effort involved in collecting and digesting information, selecting the most desirable service offering, and doing the final switching. Time and effort involved constitute costs — opportunity cost — for these customers. For some customers, a three-dollar saving per month is not a sufficient inducement to switch phone services. For others, a two-dollar saving per month would be sufficient to induce them to incur the "cost" or hassle of switching.

Moreover, the rate increases for basic service and calling features since the end of 2006 have been implemented in a series of increments. For example, rates for Caller ID and Call Waiting in MSA-1 increased by $1.00 or less on March 15, 2007, October 1, 2007 and March 15, 2008, respectively.[8] Likewise, rates for network access line increased by $1.00 as well on March 15, 2007, and March 15, 2008, respectively. Measured service customers subscribing to Caller ID and Call Waiting may not respond to every rate increase. However, as the

[8] The rate for standalone Caller ID increased by $0.81, or from $4.78 to $5.59, on March 15, 2007. All other increases for Caller ID and Call Waiting are by $1.00.

general trend in subscribership of Consumers Choice packages, basic services, Caller ID and Call Waiting demonstrates that customers do respond, and indeed have responded, to rate increase over time.

In sum, the double digit growth rate in subscribership of Consumers Choice packages refutes the notion that the safe harbors have failed, or that customer notification is inadequate. The fact that customers have been switching to Consumers Choice packages in numbers increasing by double or triple digits during each of the six-month periods since the end of 2006, in apparent response to rate increases for basic service and calling features, confirms that the Consumers Choice packages are serving as "safe harbors" in the manner that the Commission intended. The fact that some customers continue to subscribe to higher priced measured services does not diminish the importance of Consumers Choice packages as "safe harbors". Customers make their decisions based their own cost-benefit analysis, weighing the saving from lower-priced service against the "hassle" associated with switching.

V. Caller ID and Calling waiting can, as a matter of law, be classified as competitive

The AG also urges the Commission to reach the eccentric conclusion that Caller ID and Call Waiting cannot, as a matter of law, be reclassified as competitive. AG IB at 22. It bases this novel theory on Section 13-502.5(c) of the Public Utilities Act. Id.

This claim can be dismissed by merely referring to the statutory provision upon which the AG relied. Section 13-502.5(c) provides, in its entirety, that:

> All retail vertical services, as defined herein, that are provided by a telecommunications carrier subject, as of May 1, 2001, to alternative regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall be classified as competitive as of June 1, 2003 without further Commission review. Retail vertical services shall include, for purposes of this Section, services available on a subscriber's telephone line that the subscriber pays for on a periodic or per use basis, but shall not include caller identification and call waiting.
>
> 220 ILCS 5/13-502.5(c)

What this provision does, of course, is precisely the opposite of what the AG suggests. It reclassifies retail vertical services as competitive on June 1, 2003 by operation of law, without Commission review. Caller ID and Call Waiting are exempted from reclassification as competitive "without further Commission review" – i.e., by operation of law. Moreover, the alleged exemption claimed by the AG specifically attaches only "for purposes of this Section [13-502.5]", and not for purposes of any other section or of Article XIII generally. There is no reason whatever to conclude that this somehow constitutes a blanket exemption from reclassification.

This is confirmed by a review of other Sections of the Act. It is clear, for example, that the General Assembly knew how to classify services as non-competitive by statute; it applied that classification to the Section 13-518 packages. See 220 ILCS 5/13-518(d) (statutory packages classified as non-competitive). Similarly, wherever in Article XIII the General Assembly has statutorily classified services, it has done so explicitly. *See* 220 ILCS 5/13-502.5(b) (all business services provided by companies subject to alternative regulation classified as competitive); 220 ILCS 5/13-502.5(c) (all vertical services

other than Caller ID and Call Waiting provided by companies subject to alternative regulation classified as competitive); 220 ILCS 5/13-518(d) (statutory packages classified as non-competitive).

The AG's assertions are therefore meritless and should be dismissed.

VI. The Commission has authority to adopt AT&T's rate proposals

The AG argues that the Commission lacks the authority to order adoption of the rate caps and so-called "safe harbor" rate packages proposed by the Staff, and accepted by AT&T. AG IB at 24-26. It argues that the Commission has no authority to set or cap competitive rates outside of a proceeding convened to do so under Section 9-250, wherein such rates are specifically found to be "just and reasonable". Id. at 25-5. It further argues that the Illinois Supreme Court's decision in Business and Professional People for the Public Interest *et al*., Appellants, v. Commerce Comm'n, 136 Ill. 2d 192; 555 N.E.2d 693; 1989 Ill. Lexis 166; 144 Ill. Dec. 334; 117 P.U.R.4th 405 (1989) (hereafter "BPI") stands for the proposition that the Commission cannot adopt rate caps. Id. at 25-6. These arguments should be disregarded.

The AG's argument is based on a fundamental misunderstanding. In its MSA-1 Reclassification Order, the Commission determined that measured local services were functionally equivalent to package services offered in packages. MSA-1 Reclassification Order at 94. Accordingly, what the Commission found there, and what AT&T seeks here, is a finding that the market for residential telephones service is a generic one, rather than one differentiated by the manner

in which service is bundled. If AT&T's declaration, and the Commission's order approving such declaration applies to local services generically rather than to the manner in which they are combined for marketing, it follows from this that the Commission's determination that measured services in MSA-1 were competitive was not contingent upon the offerings established in the CUB-AT&T Joint Proposal.

The AG relies heavily upon the BPI decision, but what is significant about the BPI case is its stark inapplicability to the matter at hand. BPI, which related to electric tariffs filed by Commonwealth Edison in 1988, was a traditional rate-base rate-of-return proceeding wherein the matter before the Commission was whether investment and expenses associated with activating generating units at two nuclear power stations were "prudent", and such generating units "used and useful" within the meaning of Section 9-212 of the Public Utilities Act. BPI at 199, 202; 555 N.E.2d at 695, 697; 1989 Ill. Lexis 166 at 3-4, 9-10. A prudency finding, as such are informally known, would result in the investment and expenses being included in Commonwealth Edison's revenue requirement and thereafter recouped from ratepayers, provided the Commission further found: (a) that the costs associated with adding the generating units was "reasonable" within the meaning of Section 9-213 of the Public Utilities Act, and (b) that the inclusion of the generating units in rate base would lead to just and reasonable rates. Id. at 202; 555 N.E.2d at 697; 1989 Ill. Lexis 166 at 9-10.

In contrast, what is before the Commission here is not a ratemaking question. Instead, the Commission is called upon to determine whether AT&T's

residential services in the Greater Illinois MSAs are competitive, such that they should be substantially removed from the aegis of not only traditional, but even alternative ratemaking principles. In making such a determination, the Commission is not required to make any findings except with respect to the existence of competitors and the similarity or substitutability of service for the class of customers and geographic area in question. 220 ILCS 5/13-502(b). While the Commission is undoubtedly required to "consider" five enumerated "factors" in reaching its determination, *see* 220 ILCS 5/13-502(c)(1)-(5), the requirement that the Commission consider these factors is scarcely a limit upon its authority, especially where one such required consideration is "any other factor that may affect competition and the public interest that the Commission deems appropriate." 220 ILCS 5/13-502(c)(5).

Accordingly, the Commission is not bound here by the very specific statutory requirements that bound it in the BPI case. Here, the Commission may find, as it found in the MSA-1 Reclassification Order, that measured service and package service a functionally equivalent such as justifies reclassification of measured service as competitive. In reaching this decision, the Commission can, and indeed must, consider "other factor[s] that may affect … the public interest", one of which is undoubtedly the existence of safe harbors and rate caps upon measured service. This, the AG's assertion that the Commission lacks authority to consider the rate caps and safe harbors is simply wrong.

The AG advances the related argument that the Commission cannot accept a commitment by AT&T to adopt rate caps and safe harbors based upon

the BPI holding's alleged proscription of rate moratoria. AG IB at 25-26; *see also* BPI at 213; 555 N.E.2d at 702; 1989 Ill. Lexis 166 at 26-27 (Commission had no authority to unilaterally impose rate moratorium if utility did not agree). Here, of course, AT&T is specifically agreeing to the rate moratorium in question. Accordingly, the AG's argument here is deficient as well.

A further fundamental defect in the AG's presentation is the notion that the Commission is required by statute to determine specifically that competitive rates are, in all cases, just and reasonable on a going forward basis, and to furthermore do so on some sort of articulated basis. AG IB at 26-27. This proposition is contrary to the letter and spirit of the Universal Telephone Service Protection Law of 1985, 220 ILCS 5/13-100, *et seq*. In Section 13-103 of the latter, the General Assembly stated its general intention that "competition in all telecommunications service markets should be pursued as a substitute for regulation in determining the … price of telecommunications services[.]" 220 ILCS 5/13-103(b). More specifically, the General Assembly enacted Section 13-505, which provides in relevant part that: "Any proposed increase … in rates or charges … for a competitive telecommunications service shall be permitted upon the filing of the proposed rate [and upon giving publication notice]." 220 ILCS 5/13-505(a). Section 13-505 further provides that: **"[i]f** a hearing is held pursuant to Section 9-250 regarding the reasonableness of an increase in the rates or charges of a competitive local exchange service, … the telecommunications carrier … shall have the burden of … establish[ing] the justness and reasonableness of the proposed rate or charge[.]" 220 ILCS 5/13-505(b).

Accordingly, competitive rates may be changed on one day's notice, and the Commission has, as it always does, full discretion to formally review, or decline to formally review, the justness and reasonableness of such rates.

It is thus clear from the statutory scheme that the General Assembly intended competitive rates to be subjected to only a modest level of Commission review, does not require the Commission to make specific findings in all cases as to the justness and reasonableness of rate changes, and certainly does not require the Commission to *set* rates based upon costs or earnings, or any other articulated standard, as the AG apparently suggests it must.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

March 26, 2009

Respectfully submitted,

/s/_____

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